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No. 79-1697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROWAN DRILLING COMPANY AND THE FIDELITY & CASUALTY COMPANY OF NEW YORK,
Petitioners,

versus

JOSEPH A. WINK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The United States District Court for the Eastern District of Louisiana rendered a Memorandum and Order on April 20, 1977, denying respondent's Motion for Relief From Judgment. The Minute Entry embodying the Order was signed by Judge R. Blake West on July 16, 1977. Copies of the Memorandum and Order and the Minute Entry are contained in Appendix A of this Petition.

The opinion of the Court of Appeals for the Fifth Circuit is reported at 611 F.2d 98 and a copy is contained in Appendix B of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the Court of Appeals' reversal of the District Court's dismissal of Respondent's Jones Act suit on the basis of res judicata presents questions ripe for review inasmuch as the Court of Appeals remanded the case for trial.

2. Whether, on the barren record before this Court, review should be granted to reconsider the vitality of the rule in *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed 2d 239 (1942).

STATUTES AND RULES INVOLVED

The pertinent statutes and rules are printed in the Petition. (Pet. vii-viii)

STATEMENT OF THE CASE

The Petitioners in this case effected a settlement with the Respondent, concededly a Jones Act seaman who was unrepresented by counsel, by employing the following technique: On March 6, 1972 a typewritten pro se complaint, obviously prepared by Petitioners' counsel, was filed in the District Court as No. CA-72-649. Simultaneously, the Petitioners filed an answer and a joint stipulation of facts. On that same date, the court filed a consent judgment for $17,600.00 which incorporated and adopted the stipulation of facts. No delay was allowed in paying the settlement as a satisfaction of judgment was filed that same date.

Joseph Wink, the Respondent, had been employed by Petitioners as a derrick man in the Gulf of Mexico when, on June 4,

1971, he sustained a "very serious head injury" resulting in: 1) a depressed skull fracture, which later required surgical craniotomy, 2) epidural hematoma, 3) cerebral contusion, 4) hemiparesis, 5) a cranial defect in the right fronto-temporal area, 6) an abnormal EEG and 7) "definite amnesia for the immediate events surrounding the injury."

Whoever, other than the Respondent, prepared the Complaint, was somewhat moderate in his expectations as the prayer for damages was limited to $40,000 and no demand for jury trial was made. In addition, whoever prepared the Stipulation of Facts for Respondent's signature was likewise moderate in Respondent's expectations as the document extracted from Respondent a concession of his own 50 per cent contributory negligence even though he suffered from a "definite amnesia for the immediate events surrounding" his injury.

On June 4, 1974, Respondent, now represented by counsel, filed a complaint against his employer, Petitioners herein, based upon the General Maritime Law and the Jones Act, 46 U.S.C., §688 as No. CA-74-1543. At the same time, the prior settlement in case No. CA-72-649 was challenged by filing a Motion praying that the court set aside the judgment of March 6, 1972. As grounds therefore, Respondent alleged that he was misled by the Petitioners and its insurer as to extent of his own injuries, that further misleading was accomplished with respect to Respondent's mental competence, and with respect to a guarantee of a lifetime job made by Petitioners to Respondent, and that all of the pleadings filed in 1972 were prepared by Petitioners' counsel.

Petitioners did not file an Answer or Motion to dismiss Respondent's suit in No. CA-74-1543.

In addition to the matters contained in Respondent's Motion for relief from judgment, Respondent filed a Memorandum which alleged "that the procedure undertaken by the Petitioners was nothing more than a sophisticated seaman's release and

subject to attack" as such. In praying for setting aside the 1972 judgment and a trial on the merits, the Memorandum further requested, in the alternative, "a full evidentiary hearing in order to determine whether or not Joseph Wink was capable of understanding the nature of the March 6, 1972, proceedings; whether or not the settlement should be set aside because of overreaching." The District Court, after considering only depositions concerning Respondent's medical and mental disability at the time of the entry of judgment, and presuming the burden of proof to be on Respondent, denied Respondent's Motion to set aside the judgment, denied Respondent's request for an evidentiary hearing on the question of his mental capacity in March, 1972, did not rule on the prayer for a hearing on the issue of Petitioners' overreaching, and dismissed the Complaint as barred by res judicata.

The Court of Appeal reversed the District Court and remanded the case to the District Court with instructions that Respondent be permitted to proceed with his new action at which time the Petitioners could assert the prior settlement as an affirmative defense. This result was predicated on the grounds that no record having been made before the District Court, no means were available whereby the Court of Appeals could test the validity of the settlement effected by the Petitioners.

REASONS FOR DENYING WRIT

I.

Because the Court of Appeals Held the District Court Erroneously Applied Res Judicata to Respondent's Jones Act Suit, and Remanded the Case for a Trial Where That Issue Could Be Raised By Petitioners As An Affirmative Defense, This Cause Is Not Ripe for Review By This Court.

The review sought here by Petitioners is abortive because the Fifth Circuit Court of Appeals remanded the case to district court for trial; the order of the Court of Appeals is, therefore, interlocutory in nature, rendering this case unripe for review in its present posture. A brief review of the proceedings below demonstrates this.

Petitioners' second and third questions presented are interrelated so as to make appropriate their discussion together. A conceptual confusion has tracked Petitioners throughout the proceedings below and in their Petition before this Court. The Respondent filed, within the time limited by statute, 46 U.S.C. §688, a Jones Act suit seeking indemnification for employment injuries. At the same time, he filed a Motion pursuant to Rule 60(b) to set aside the judgment in the "friendly Jones Act suit" filed by his employer's counsel. The Court of Appeals reversed the District Court because the District Court refused to allow Respondent to proceed to a hearing on the second suit, which would have necessarily determined the validity of the judgment in the "friendly" suit if the Petitioners had raised the settlement judgment as an affirmative defense; instead, the District Court dismissed the second suit on the ground of res judicata. Actually, it is the District Court's dismissal of Respondent's second action which is the precise target of the reversal by the Court of Appeals and it is arguable whether the District Court's action in denying Respondent's Rule 60(b) Motion was critical for the

opinion of the Court of Appeals, as the validity of the judgment in the "friendly Jones Act" suit is yet to be judicially determined; the Court of Appeals made no such determination, but relegated that function to the trial court on remand. As the opinion states: "Accordingly, we reverse the district court and remand with instructions that Wink be permitted to proceed with his new action against Rowan. Rowan may claim the prior settlement as a defense, but it must bear the burden of proving that Wink had an informed understanding of the significance of the settlement when he signed it. Should Wink prevail at trial on this issue, the court should set aside the prior judgment and proceed accordingly." (A-13, 14)

The posture of this case is thus one which has not ripened so as to make appropriate the argument which Petitioners have raised.[1]

Under these circumstances, although this Court has jurisdiction to review the Court of Appeals' order, the grant of certiorari would be improvident, or at least, premature. As stated by Mr. Justice Stevens, dissenting in *Estelle* v. *Gamble*, 429 U.S. 97, 114, 50 L.Ed2d 251, 266, 97 S.Ct. 285, the normal practice of this Court is to deny interlocutory review. He cited R. Stern and E. Gressmon, Supreme Court Practice whose 5th. edition, 1978 states at p. 300:

> "The Supreme Court will not usually grant certiorari to review a nonfinal judgment, such as one remanding the case to the district court for a new trial or one sanctioning the issuance or denial of a preliminary injunction, in the

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[1] If the Court of Appeals had, in fact, entered an order granting relief under the Rule 60(b) Motion which vacated the judgment in the "friendly" suit, leaving the case pending for further determination, the order would be analogous to an order granting a new trial. Being interlocutory in nature, questions would arise as to appealability. Moore's Federal Practice, Vol. 7, §60.30(3), p. 431-432.

absence of some exceptional reason. As stated in *American Construction Co.* v. *Jacksonville, T. & K.R. Co.*, 148 U.S. 372, 384, "this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." See *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 584-585; *Cobbledick* v. *United States*, 309 U.S. 323, 324-325; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (lack of finality "of itself alone furnished sufficient ground for the denial"); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). Mr. Justice Stevens, dissenting in *Estalle* v. *Gamble*, 429 U.S. 97, 114, referred to "the Court's normal practice of denying interlocutory review."

This is not the "extraordinary" case which would justify issuance of a writ of certiorari prior to a final judgment. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258, 60 L.Ed. 629, 633.

II.

Where Traditional Policy, As Evinced by Congressional Enactment and Judicial Doctrine, Puts Seamen in a Favored Status, the Rule in *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239 (1942), Placing the Burden of Sustaining the Validity of a Seaman's Settlement on the Employer, Should Not Be Disturbed.

Conceding that the rule proclaimed in *Garrett* v. *Moore McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942), whereby an employer is required to sustain the burden of establishing the validity of a seaman's settlement of an employ-

ment injury claim, "has been consistently followed" (Petition, p. 7), Petitioners nevertheless assert the policy considerations which underpinned the rationale for Garrett's rule have been dissipated by evolving socio-economic factors which have, it is claimed, narrowed the recognized disparity in the bargaining positions of the maritime employer and the seaman. One would expect so audacious an approach would be fully buttressed by empirical data and documentation, but Petitioners seem content in relying only on two pages of short quotations from two commentators whose knowledge of the maritime industry and its seamen is entirely obscured.

The policy considerations which prompted the rule in *Garrett* have been persistently recognized and supported. As the court stated in *Kelcey* v. *Tankers Company*, 217 F.2d 541, 546 (2d Cir., 1954), "...allocation of the burden of proof rests on policy considerations. The policy vis-a-vis a seaman's release has been emphatically declared by the Supreme Court.

The favored status of seamen rests not only on judicial doctrine, but also on Congressional policy. *Bainbridge* v. *Merchants & Miners' Transportation Co.*, 287 U.S. 278, 53 S.Ct. 159, 77 L.Ed. 302 (1932), citing *Robertson* v. *Baldwin*, 165 U.S. 275, 287, 17 S.Ct. 326, 41 L.Ed. 715, 719 (1896), which points out that as early as 1790 Congress enacted legislation (1 Stat. at L. 131, §7) for the protection and benefit of seamen because Congress recognized their status as "wards of admiralty". Although Congress has not addressed directly the issue of seaman's releases, the considerable body of statutes extant, investing seamen with benefits denied the shore worker, clearly evince a Congressional policy to spread a protective umbrella over the seaman. As recently as 1972 Congress spoke on the advisability, indeed the necessity, of distinguishing the seaman from his more pedestrian shoreside fellow worker. In House Report No. 91-1441 on the 1972 Amendments to the Longshoremens' & Harbor Workers' Compensation Act, P.L. 92-576, the Committee reported: "The rationale which justifies

holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port." 1972 United States Code Congressional & Administrative News, Vol. 3, p. 4698, 4703.

The deference paid by the courts to legislative policy was aptly described by Justice Holmes in *Johnson* v. *United States*, 163 F.30, 32, quoted with approval in *Van Beeck* v. *Sabine Towing Co.*, 300 U.S. 342, 351 57 S.Ct. 452, 81 L.Ed. 685, 690 (1936), when he stated if the legislature "...has intimated its will, however indirectly, that will should be recognized and obeyed." The *Garrett* opinion recognized the policy of Congressional solicitude for seamen when it referred, in support of its conclusion, to that provision of the Longshoremens' & Harbor Workers' Compensation Act, 33 U.S.C. 915, 916 which invalidates all releases not made under the express terms of the Act. Significantly, this provision was not changed by the 1972 amendments to the Act, Pub. L. No. 92-576, 86 Stat. 1251. See *Capotorto* v. *Compania Sud Americana de Vapores, Etc.*, 541 F.2d 985 (2d Cir. 1976), which notes this Congressional action and reasserting "The particularly authoritarian relationship of shipowners and their representatives to seamen and the isolation of the latter from the legal, economic, and psychological support of a landbased community may put the seaman at a serious bargaining disadvantage." 541 F.2d at 987.

If, as Petitioners state, Justice Holmes questioned the cold hand of stare decisis, he also reminded us that "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 348, 41 S.Ct. 506, 65 L.Ed. 963 (1920). That page of history reflecting the favored status of seaman was sketched in masterly fashion by Judge Frank in *Hume* v. *Moore-McCormack Lines*, 121 F.2d 336 (2d Cir. 1941) where he demonstrated that the traditional rule which casts upon the employer the burden of proving the validity of a seaman's settlement is predicated not only on the continuing disparity of the

bargaining power between the seaman and his employer, but also on the need—"surely pertinent today"—of promoting the national defense "by inducing men to accept employment in an arduous and perilous service." *Calmar S.S. Corp.* v. *Taylor*, 303 U.S. 525, 528 58 S.Ct. 651, 653, 82 L.Ed. 993 (1937).

Petitioners argue the Fifth Circuit has improperly extended the *Garrett* doctrine to judgments. It is sufficient answer to point out, as did the Fifth Circuit, that the judgment involved herein "did not result from a litigated determination of the merits of the case. Both the pleadings and the joint stipulation of facts were prepared by Rowan and agreed to by the seaman without any advice from outside counsel. The Court's judgment, filed the same day as the pleadings, mirrors the language used in the stipulation of facts. And, most importantly, the absence of any record of the 1972 proceeding raises the possibility that the court merely rubber-stamped the parties' extrajudicial statement." (A-3) The applicability of res judicata to consent judgments has been attenuated in non-maritime cases as well. See *Kaspar Wire Works, Inc.* v. *Leco Engineering and Mach.*, 575 F.2d 530, 538 (5th Cir. 1978), where the court stated:

> "Such a consent decree, however, is not identical in effect to the conclusion reached by a judge after a trial; thus, an appeal on the merits usually does not lie from it. The parties' proposal does not reflect the considered judgment of a judicial officer: it has been forged by them alone as an adjustment of conflicting claims and it is not a tempered determination of fact and law after the annealment of an adversary trial. Depending on the temperament and the calendar of the trial judge, the decree may be subject to serious scrutiny, superficial examination, or perfunctory inspection accompanied by a hosanna because another case is off the calendar. Indeed, it appears to be the view of some members of the bar that judicial examination of the terms of a private settlement is intrusive."

Investing consent judgment settlement with the same sanctity as a contested judgment, thereby subjecting the seaman to the burden of proof, time limitations, and procedural difficulties inherent in Rule 60 has the effect of undermining by subversion the broad policies which underpin the admiralty's traditional protective relationship with seamen. It would allow the employer, by using the imprimature of the court, to escape his traditional burden thereby rendering impregnable a settlement which contains the seeds of vulnerability.

Petitioners during neither the District Court nor Court of Appeals proceedings challenged the vitality of the *Garrett* rule; indeed, the opinion of the Court of Appeals specifically recites that Petitioners conceded the validity of the principles followed since *Garrett*. (A-11) On the impoverished record before this Court, considrable temerity is required to seek to disrupt almost two centuries of Congressional policy favoring the seaman and to attempt impairment of the continuing virility of the holding in *Garrett* v. *Moore-McCormack*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed 239 (1942).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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